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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TINA MARIE ALBERTINI, Plaintiff and Appellant, v. ANDREW ARIZA, Defendant and Respondent.	B200808 (Los Angeles County Super. Ct. No. SC091935)

APPEAL from an order of the Superior Court of Los Angeles County, John Segal, Judge. Affirmed.

Albertini & Gill and Eugene J. Albertini for Plaintiff and Appellant.

Calendo, Puckett, Sheedy & DiCorrado and Christopher M. Sheedy for Defendant and Respondent.

INTRODUCTION

Plaintiff Tina Marie Albertini appeals from an order granting a special motion to strike (Code Civ. Proc., § 425.16) by defendant Andrew Ariza. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Allegations of Plaintiff's Second Amended Complaint*

Plaintiff's second amended complaint, the operative complaint here, against defendant contains six causes of action: civil conspiracy, intentional infliction of emotional distress, negligent infliction of emotional distress, slander, malicious prosecution and false imprisonment. In her complaint, plaintiff alleges as follows:

Plaintiff and defendant were involved in a romantic relationship which resulted in the birth of a daughter in July 2004. A few weeks later, defendant brought an action in the family law court to obtain physical and legal custody of their daughter.

In September 2004, defendant filed a complaint against plaintiff with the Los Angeles Police Department, alleging trespass. The police declined to take any action against plaintiff.

On September 22, 2004, the family law court issued an order providing for joint custody of plaintiff and defendant's daughter.

Approximately a year and a half later, defendant's attorneys notified plaintiff of an ex parte hearing set for April 4, 2006 in the family law court for the purpose of obtaining

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[1] In setting forth the facts of this case, we include only the factual allegations of the complaint and factual statements in the declarations submitted on the special motion to strike. We do not include factual and legal conclusions, interpretation of the facts, or speculation, with which these documents are replete. (Code Civ. Proc., § 425.16, subd. (b)(2); *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 654, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.)

a temporary restraining order (TRO) against plaintiff. Defendant alleged that plaintiff had entered his residence and taken some documents and a CD. The application for a TRO was based in part on the declaration of Anne Cooke (Cooke), defendant's neighbor, who stated that plaintiff was at the front door of defendant's residence on April 1, 2006.[2]

Defendant deposed plaintiff on April 19, 2006. At that time, plaintiff repeatedly denied being in his residence on April 1. At a hearing on April 24, defendant showed a videotape to the court. This videotape allegedly showed plaintiff in defendant's residence on March 31, 2006 at 9:10 p.m. Plaintiff, who was representing herself at the hearing, did not object to the admission of the videotape.

About this same time, defendant filed another complaint against plaintiff with the Los Angeles Police Department. He provided the police with the same videotape he had shown to the family law court. He also provided them with a statement by Cooke, that she saw plaintiff walk out of defendant's front door. On May 10, 2006, a three-count felony complaint was filed against plaintiff, charging her with two burglaries and perjury. Plaintiff was arrested pursuant to a warrant on May 12. Thereafter, defendant delivered a partial transcript of the April 24, 2006 family law court hearing to the district attorney's office, and a fourth felony count for perjury was added to the criminal complaint.

On May 31, 2006, defendant deposed Bobbie Minton (Minton). He questioned her regarding a previous deposition in which she stated that on the evening of March 31, 2006, she and plaintiff went out to dinner, and she was with plaintiff until at least 9:30 p.m.

A preliminary hearing in the criminal matter was held on November 14, 2006. Following the hearing, the case was dismissed.

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[2] Cooke was named as a defendant in plaintiff's original complaint. She obtained a judgment on the pleadings. Defendant's attorneys, who also were named in plaintiff's original complaint, subsequently obtained a judgment in their favor after the trial court granted their special motion to strike.

The gravamen of plaintiff's complaint is that defendant fabricated the evidence he used against her in the family law action and presented to the police and prosecution in the criminal matter, including an altered videotape that falsely indicated she was in his residence at 9:10 p.m. on March 31, 2006. She also claims he withheld exculpatory evidence from the police, specifically Cooke's statement that she saw plaintiff at the front door of defendant's residence rather than coming out of defendant's residence.

B. *Defendant's Anti-SLAPP Motion*[3]

Defendant filed both a demurrer to plaintiff's second amended complaint and a special motion to strike. In opposition to defendant's special motion to strike, plaintiff presented the following evidence:

1. Police Report of Cooke's Statement

A police report prepared by Officer Moreno of the Los Angeles Police Department states: "Witness [Cooke] stated on 04-01-06 at approximately 1715hrs, she was in her front yard, looking at her front yard side fence, (which divides Victim's [defendant] residence from Witnesses [*sic*] residence), in an attempt to repair her fence, when she observed Suspect [plaintiff] walk out of Victim's front residence door. Witness observed Suspect reading an unknown document, as she was walking out of the front door and onto the front lawn. Witness then walked onto the sidewalk and shouted 'Christina (Suspect)', in an attempt to gain Suspect's attention. Suspect stopped and turned in Witnesses [*sic*] direction. Witness approached Suspect and advised Suspect that Victim was not home. Suspect then stated 'that's all right. I stopped to pick up some papers he left for me.' Witness then observed Suspect holding 2-3 paper documents and an unmarked CD.

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[3] A special motion to strike is also known as an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion. A SLAPP is intended to chill the exercise of the right of free speech or the right to petition the government for redress of grievances. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

Witness and Suspect talked for several minutes, and Suspect fled in an unknown marked vehicle."

2. Cooke's Declaration

Cooke stated in her declaration that at 5:15 p.m. on April 1, 2006, she was standing at her front gate talking to neighbor Steve Haggerty (Haggerty). "As I stood at my front gate, I observed an individual personally known to me as Christina Albertini standing at the front door of Andrew Ariza's residence. . . . [¶] . . . I continued to observe Christina Albertini as she walked slowly across the lawn of the residence of Andrew Ariza to the gate on the west side of Andrew Ariza's property. I observed that Christina Albertini was reading a sheet of paper and was unaware that we were observing her. [¶] . . . I walked out of my gate to the sidewalk and called out 'Christina.' I then observed Christina Albertini stop and turn around. I walked over to Christina Albertini and began a conversation with her. I informed Christina Albertini that Andrew Ariza was not at home. Christina Albertini stated to me, 'That's all right. I stopped to pick up some papers he left for me.' I observed that Christina Albertini was holding two or three sheets of paper with text from a computer printer and a CD with a hard label of the type that has been burned on a home computer. [¶] . . . I spoke with Christina Albertini for approximately two (2) minutes."

3. TRO

Attached to the April 4, 2006 TRO in the family law action is defendant's declaration. In it, he stated that for some time, plaintiff had been trying to gain access to his house, and he had changed the locks in case she had made copies of his keys. On April 1, 2006, Cooke and Haggerty informed him that "they spotted [plaintiff] in the vicinity of my front porch, holding certain documents as well as a CD. [Cooke] approached [plaintiff] and told her that I wasn't home, at which time [plaintiff] replied, 'Oh, I know, he just asked me to pick up some papers for him.'" Defendant had not

asked plaintiff to pick up any papers and had asked plaintiff to stay away from his house except for custody exchanges.

Defendant stated that over the past several months, he had frequently noticed legal and financial documents missing from his house. Plaintiff seemed to know details of his life that he had not told her. She also showed up places where he was. These incidents suggested that plaintiff was stalking him.

Defendant also stated that plaintiff was "hacking" into his cell phone and computer; plaintiff admitted to him that she had deleted the telephone numbers of other women from his cell phone. Additionally, plaintiff had used his identity to apply for credit cards and had made unauthorized purchases on his credit cards.

Defendant added that plaintiff claimed their daughter was having health problems in order to gain his attention and feared plaintiff might actually harm their daughter in order to do so. He also was concerned that plaintiff made disparaging remarks about him in front of their daughter.

4. Minton's Declaration

Minton stated that plaintiff and the parties' daughter joined her and a friend for dinner on March 31, 2006. Their reservations were for 6:45 p.m. They left at approximately 9:30 p.m.

5. Declaration of Paul Provenzano in the Family Law Action/Testimony at the Preliminary Hearing

Paul Provenzano (Provenzano) was hired by plaintiff to investigate defendant's security system. He purchased the same system that defendant used. He was able to manipulate the date on the surveillance video.

Provenzano testified in greater detail at plaintiff's preliminary hearing. He pointed to inconsistencies in the surveillance video and defendant's computer hard drive suggesting alteration of the video.

6. Excerpts from Preliminary Hearing Transcript

At the end of the preliminary hearing, Judge Donna Groman stated: "There is a very low threshold in a preliminary hearing. But I think this is a case that doesn't even rise to that standard. [¶] As to counts 1 and 2 [burglary], the court does find the People's evidence to be unreliable with respect to date and time. [¶] As demonstrated by Mr. Provenzano, it became clear to the court that this type of videotape is not the same as that that we see in store security systems. It wasn't intended for that purpose, and the court was convinced that the date and time could easily be manipulated.

"The court was also troubled by the fact that there was no recording of the April 1st incident, found that a bit curious. The tape itself that the court viewed, the court did not see any breaking or entering, did not actually see [Ms. Albertini] taking anything in the home. And there was testimony that Ms. Albertini had been in Mr. Ariza's home with his consent in the location where she was videotaped.

"The court has to take Mr. Ariza's testimony in the context of the conflict that is now ensuing between the parties, and that does detract a bit from Mr. Ariza's credibility, in light of these other factors. There is also an alibi witness in regard to March 31st, 2006.

"So on the whole, the court cannot find a reasonable suspicion as to counts 1 and 2. [¶] And as a consequence, counts 3 and 4 [perjury] would similarly be dismissed, as there is no showing of any false testimony." The court then dismissed all four counts.

The trial court granted defendant's anti-SLAPP motion. It ordered defendant's demurrer off calendar as moot.

DISCUSSION

A. *The Anti-SLAPP Statute*

Code of Civil Procedure section 425.16 (hereinafter section 425.16), the anti-SLAPP statute, provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United

States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. [¶] . . . In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(1) & (2).)

In determining whether an anti-SLAPP motion should be granted, the court engages in a two-step process. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67.) First, it determines "whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity." (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056.) In order to demonstrate that the complaint contains "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech" (§ 425.16, subd. (b)(1)), the defendant must show that the conduct by which the plaintiff claims to have been injured falls within one of the four categories specified in subdivision (e) of section 425.16.[4] (*Equilon Enterprises*, *supra*, at p. 66.)

If the defendant meets his burden, the trial court must then determine whether plaintiff has met her burden. That is, it must determine whether plaintiff has shown a probability of prevailing on her claim. (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056; *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 76.)

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[4] The statute defines "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' [to] include[]: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

On appeal, we review the trial court's determination de novo. (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1055.) The questions are whether the defendant has satisfied his burden of establishing that section 425.16 applies (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999) and "whether the plaintiff [has] satisfied [her] burden of making a prima facie showing of facts that, if proven at trial, would support a judgment in [her] favor." (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174, 184).

B. *The Trial Court's Ruling*

In granting defendant's anti-SLAPP motion, the trial court summarized plaintiff's opposition to the motion as "based on a claim that [defendant] provided the police with false information. Plaintiff argues in conclusion that '[defendant] ***manufactured, concocted evidence*** outside of the Family Law case'" which precluded his reliance on Civil Code section 47, subdivision (b), and section 425.16. Further, "defendant 'was the operative individual who created all of the ***false and fraudulent evidence*** which was subsequently used by [defendant] to ostensibly be reporting crimes . . . , committed by' plaintiff."

The court first found that defendant "met his threshold burden of showing that his statements or writings were made before a judicial proceeding or in connection with an issue under consideration or review by 'any other official proceeding.'" Plaintiff's claims were "based on the allegations that defendant filed criminal complaints with the Los Angeles Police Department." They thus "arise from the protected activity of initiating and filing criminal complaints."

The court then found that "plaintiff cannot show a probability of prevailing because the absolute privilege of Civil Code section 47[, subdivision](b) bars all but one of the causes of action," that is, all causes of action but the one for malicious prosecution. That defendant's communications with the police may have been "false or perjurious does not change the result." The court specifically rejected plaintiff's assertion that there was a difference "'between *reporting* a crime, and ***manufacturing*** the ***evidence*** outside of a judicial environment, the facts in support of the purported criminal violations.'" It

noted that plaintiff provided no authority for her assertion, and "California law is contrary, for purposes of the litigation privilege."

As to plaintiff's cause of action for malicious prosecution, the trial court found that plaintiff failed to show a probability of prevailing on her claim. Specifically, "the court conclude[d] that plaintiff has not made the required showing that [defendant] initiated the criminal case without probable cause, that he manufactured or manipulated evidence (i.e., security video showing plaintiff within [defendant's] residence on March 31, 2006), or that he made false representations to the police." The court rejected Provenzano's declaration as unsigned and unauthenticated. Additionally, the court concluded that "the transcript of the November 16, 2006 preliminary hearing does not show that the trial judge concluded that [defendant] had manufactured or altered the videotape. . . . Although the trial court found that 'the people's evidence [was] unreliable with respect to date and time,' the most that the court stated was that 'the date and time could easily be manipulated,' not that it was. . . ." Since plaintiff failed to present admissible evidence that defendant presented a false and fraudulent videotape to the authorities, plaintiff failed to show a probability of prevailing on the merits with respect to the lack of probable cause element of malicious prosecution.

C. *Plaintiff's Claims of Error*

1. Impermissible Application of Section 425.16

Plaintiff contends the trial court "totally misapplied" section 425.16, in that it "did not properly look to the *activity* which was the underlying activity as engaged in by [defendant] which gave rise to the purported crime(s) that were reported." Plaintiff's position is that there was no protected activity to which section 425.16 applied, therefore the trial court erred in requiring her to establish a probability of prevailing on her claim.

As in the trial court, plaintiff fails to cite any authority for her contention., i.e., that defendant can be held liable for manufacturing a false and fraudulent videotape apart from its use in the proceedings against plaintiff. In fact, as previously stated, the gravamen of plaintiff's complaint is that defendant fabricated the evidence he *used*

against her in the family law action and presented to the police and prosecution in the criminal matter. In other words, it was his use of the videotape as evidence in these proceedings which injured her, not his manufacture of the videotape.

It is plaintiff's burden on appeal to demonstrate, with citation to supporting authority, the claimed error. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.) She has failed to demonstrate that the trial court misapplied section 425.16.

2. Application of the Wrong Standard to False Declarations

Plaintiff contends the litigation privilege does not apply to the submission of false declarations or evidence in judicial proceedings. She claims that the submission of false evidence is a wrongful act, which is not protected by the litigation privilege, rather than a communicative act, which is protected. As the trial court found, plaintiff is incorrect.

The Supreme Court has made it absolutely clear that the submission of falsified evidence is still "'communication, not conduct.'" (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1058.) It therefore is protected by the litigation privilege. (*Ibid*.)

As discussed above, plaintiff claimed injury from the use of the alleged false evidence in judicial proceedings, not the manufacture of the evidence. "To show that the litigation privilege does not apply, the plaintiff must demonstrate that 'an independent, noncommunicative, wrongful act was the gravamen of the action . . . .'" (*Ramalingam v. Thompson* (2007) 151 Cal.App.4th 491, 503, quoting from *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1065.) This plaintiff has failed to do.

If plaintiff alleged injury from the creation of the false evidence, the litigation privilege would not apply. (*Ramalingam v. Thompson*, *supra*, 151 Cal.App.4th at p. 503, see, e.g., *Kimmel v. Goland* (1990) 51 Cal.3d 202, 212.) Since the alleged injury resulted from the use of that evidence in proceedings against plaintiff, i.e., the communication of that evidence, the litigation privilege applies. (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1058; *Ramalingam*, *supra*, at p. 503.)

3. Proof of a Probability of Prevailing on Plaintiff's Claims

The sum of plaintiff's argument is that the evidence she submitted to the trial court showed that she had a probability of prevailing on her claims. This is wholly insufficient to meet her burden on appeal.

Plaintiff has the affirmative burden on appeal of demonstrating that the judgment is infected by prejudicial error. (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971; *Mohn v. Kohlruss* (1987) 196 Cal.App.3d 595, 598.) She must "convince the court, by stating the law and calling relevant portions of the record to the court's attention, that the trial court decision contained reversible error." (*Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) She has failed to do so.

4. Criminal Acts Not Covered

Plaintiff contends that because defendant was guilty of criminal acts, neither section 425.16 nor the litigation privilege applies. She fails to cite any supporting authority for this contention and thus has failed to meet her burden of demonstrating error. (*Culbertson v. R. D. Werner Co., Inc.*, *supra*, 190 Cal.App.3d at p. 710.)

DISPOSITION

The order is affirmed. Defendant is to recover his costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.